88-1269

No.

Supreme Court, U.S.
FILED
JAN 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

RAYMOND J. TORRES, FRANKLIN J. UTZ, and GERALD F. SCHMIT,

Petitioners,

v.

WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES, TAYCHEEDAH CORRECTIONAL INSTITUTION, NONA J. SWITALA, and CERTAIN UNNAMED DEFENDANT EMPLOYEES OF THE WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents were served the initial Petition for Certiorari in Torres, et al. v. Wisconsin DHSS, et al., Docket No. 88-1046, on December 22, 1988.

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QUESTIONS PRESENTED

1. Whether the court erred in failing to defer to prison administrators judgment establishing regulations to

anticipate and prevent security problems as required by recent United States Supreme Court decisions?

2. Whether a bona fide occupation qualification ("BFOQ") plan can be found reasonably necessary on the basis of appropriate security regulations and attendant privacy problems?

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OPINIONS BELOW

The en banc Opinion of the Court of Appeals for the Seventh Circuit is reprinted in the appendix to the initial petition (Initial Petition, A. 1a).

The panel Opinion of the Court of Appeals for the Seventh Circuit is reported at 838 F.2d 944, and is reprinted in the appendix to the initial petition (Initial Petition, A. 37a).

The Decision and Order of the United States District Court, Eastern District of Wisconsin, the Honorable Robert W. Warren presiding, is reported at 639 F. Supp. 2721, and is reprinted in the appendix to the initial petition (Initial Petition 68a).

JURISDICTION

Respondents rely upon the statement of jurisdiction in the initial petition.

STATUTE INVOLVED

Respondents rely upon the statement of the statute involved in the original petition.

SUPPLEMENTAL STATEMENT OF THE CASE

A. Facts and background.

Several critical facts have been omitted from the petitioners' statement of facts and both lower court opinions.[1] These facts relate to the respondents' security and privacy justification for the female sex BFOQ.

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[1]Facts recited in the en banc opinion are cited to the initial petition's appendix at the page where the fact is cited. Facts not found in the en banc opinion are cited to the trial record.

Taycheedah Correctional Institute's ("TCI") BFOQ plan was implemented to maximize security without unduly diminishing inmate privacy and impairing rehabilitation. (The rehabilitation prong is not the subject of this cross petition and, therefore, will not be discussed further.) The plan required at least one female correctional officer for each living unit.

The three residential buildings at TCI are set up similar to college dormitories in that the inmates reside in single, double or multiple occupancy rooms with wooden doors rather than cells with bars (A. 2a). However, TCI is a maximum (and medium and minimum) security prison. The inmates can be observed in their rooms through a clear glass window located in the wooden door at eye level. (Id.) The rooms contain beds,

dressers, toilets and wash basins. There are privacy curtains around the toilets in two houses. (Id.) Privacy cards were permitted for ten minute intervals to allow inmates to undress and change (A. 3a). The officers are not able to keep track of the time for which privacy cards are used in the multiple occupancy rooms. (Id.) Inmates have used the privacy cards to escape and to assault other inmates. (Id.) The privacy cards cannot be used on the inside at night when there are no male roving correctional officers in the house (A. 3a).

Each floor of the house has a shower and/or bathroom (A. 3a). Inmates must have permission to use the showers (A. 3a, 4a). They are allowed fifteen minutes. (Id.) Only inmates who are roommates may shower together. (Id.)

The showers and bathrooms have solid doors and the showers themselves have curtains. (Id.) Inmates in the shower or bathrooms cannot be observed from the hallway. (Id.)

The staffing pattern in the housing units has varied over the years depending on the level of security and other functions taking place in the house (Vol. 1 at 31-60, 68; Vol. 8 at 81-84; Vol. 9 at 72-73). In general, the lower the security status, the higher the correctional officer/inmate ratio. Thus, in the maximum security house, each floor is a complete living unit with its own correctional officer in charge, whereas, in the minimum house, there is only one correctional officer in the entire three floor unit on certain shifts (Vol. 1 at 33-60). In addition to other duties, the housing units sergeants were

responsible as either the living unit officer for the first floor or the living unit officer covering the entire building (Vol. 8 at 92; Vol. IX at 82-83). The sergeant was the last officer to ever be pulled from a house in order to meet other staffing shortages or to cover for emergencies (Vol. 9 at 82).

Defense experts with experience at the level of superintendent or security director all testified that observation is the key to security and that, therefore, each and every area in an institution must be observed (Vol. 9; Vol. 11 at 114-142). Effective surveillance incorporates both routine and random observations. (Id.) The post orders for the sergeant's posts and those for each post covering a living unit at TCI required routine and random surveillance of all areas of the housing

units, including inmate rooms and bathrooms and showers, whether occupied or unoccupied (Stipulated Exhibits 350-59). In addition, officers in living units conducted both routine and random frisk searches, random urine testing and, with authorization, strip searches (Vol. 8 at 93-103).

Correctional administrators also gave uncontradicted testimony about the security problems that mandated the continual observation of inmates; strongarming and other assaultive conduct, drug trafficking and usage, and violation of the institution's rules (Vol. 10 at 33, 40-42; Vol. 11 at 130). These experts also testified about the stradegems employed by male correctional officers to avoid invading female inmates' privacy and expressed their opinions as to the security risk

resulting from the males' natural desire to respect the females' bodily privacy (Vol. 9 at 42-44; Vol. 11 at 87).

The trial testimony of the petitioners was that they did not invade the inmates' privacy by being in the housing units because they did not look into the showers or the rooms where they were occupied. Indeed, one of the petitioners testified that he had not looked into an occupied bathroom once in five years (Vol. 1 at 175-76). Many of both male and female line officers who testified for the petitioners swore that they did not follow their post orders by observing all housing areas under their control (Vol. 1 at 175-76; Vol. 2 at 81-82, 220; Vol. 3 at 85, 87, 143, 207, 243; Vol. 4 at 83). The superintendent and all respondents' administrative experts opined that a

security risk was created as a result of a lack of observation.[2]

The trial court concluded and the appellate court affirmed the conclusion that the privacy of the inmates was not unduly invaded by the presence of male living unit officers because the male officers did not invade the inmates' privacy (A. 92a, 6a-8a). The trial court concluded that the security was not impaired by the presence of male officers because there were no specific complaints about the males job performance and, as the court of appeals noted, there was not any proven decline in inmate escapes or violence as a result of the BFOQ plan (A. 85-6a; 7a).

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[2]The Superintendent was unaware of the plaintiff's and other witnesses disregard of their post orders.

REASONS FOR GRANTING THE PETITION

INTRODUCTION

Respondents have opposed the initial petition on numerous ground, among them, the ground that the Seventh Circuit's decision calls for a remand for further trial proceedings and, therefore, the case is not ripe for review at this time. Only if the court decides to grant the initial petition, are respondents asking this court to grant this cross-petition.

I. THE DECISION CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT HOLDING THAT THE FEDERAL COURTS ARE TO DEFER TO THE JUDGMENTS OF PRISON ADMINISTRATORS WITH REGARD TO SECURITY REGULATIONS THAT ANTICIPATE AND PREVENT SECURITY PROBLEMS.

All of the experts with experience administering prisons testified that observation is the touchstone of security

in a prison. Not suprisingly, the post orders for each of the areas designated as a living unit required that the officer in charge make continual routine and random observations of all areas inhabited by the inmates, whether occupied or unoccupied. This responsibility could not be carried out without substantial intrusion upon the inmates' bodily privacy. The penal experts with administrative experience agreed that a security risk exists if a male correctional officer is called upon to violate societal norms by peering into bathrooms or bedrooms in which opposite sex inmates may be partially clothed or engaged in bodily functions or conducting personal searches of these inmates. They testified that security is impared when inmates know that because male officers are on duty routine security precautions,

including body searches and observation, will be delayed or will not occur at all. These experts agree that the risk was minimized and security goals efficiently met by the deployment of same sex officers where such security tactics are required. By requiring one same sex officer for each post covering a living unit, the TCI BFOQ plan ensured that the essential security responsibilities were carried out safely and efficiently with the minimum possible invasion of the inmates limited privacy.

The petitioners asserted that they did not violate any privacy rights held by the inmates because they did not follow their post orders and observe the inmates in their rooms or in the baths or

showers.[3] Thus, when the petitioners were on the job, the inmates could rest assured that whatever they did in those areas, they would not be observed by these officers. The petitioners and their witnesses, both male and female line officers, gave their opinions that their violations of their post orders did not impair security. The superintendent, and all of the expert witness penal

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[3]The male officers were required to perform all observational security responsibilities although the administration had relieved them of responsibility for the performance of strip searches, pat searches and urine sampling. Since the petitioners relieved themselves of their duty to observe, there remained only the gatekeeper and paper shuffler functions. The petitioners' aspiration to such limited responsibilities in a maximum security prison is perhaps understandable, however, the prison administration cannot be expected to accommodate this limited function under the concept of administrative accommodation as it is obviously highly inefficient as well as inherently risky.

administrators who shouldered responsibility for establishing institutional security disagreed with the petitioners and maintained that the petitioners' failure to carry out their full employment duties created a security risk.

The well established rule is that federal courts should defer to the judgments of prison administrators on security regulations. The reasons for this deference are well known:

> Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say

> that the problems of prisons in America are complex and intractable . . . .

Procunier v. Martinez, 416 U.S. 396, 404-05 (1974).

Thus, the supreme court has said that the courts owe deference to prison administrators so that the "prison administrators . . . and not the courts, . . . make the difficult judgments concerning institutional operations." Turner v. Safley, 107 S. Ct. 2254, 2261 (1987). The deference principle applies to encourage prison administrators to "adopt innovative solutions to the intractable problems of prison administration." and to "anticipate" security problems. Id., O'Lone v. Estate of Shabazz, 107 S. Ct. 2400, 2405 (1987). A prison administrator does not have to prove the existence of a security risk by empirical evidence such as a

riot, a homosexual assault or a drug overdose, to benefit from the deference standard.[4] As with an airline, the prison administrator cannot be expected to establish the risk of accident or security lapse to a certainty ". . . for a certainty would require running the risk until a tragic accident would prove that the judgment was sound." (Citations omitted.) Western Air Lines v. Criswell, 105 S. Ct. 2743, 2754 (1985).

The decision's finding that the petitioners did not impair security by their disregard of their duty to observe, as set forth in their post orders, violated the court's responsibility to

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[4]Needless to say, the very ordinariness of the security procedures at issue in this case shows that they bear a rational relationship to the legitimate penological goal of promoting security. See also, Bell v. Wolfish, 441 U.S. 520 (1979).

accord deference to prison administrators' judgments on day to day security operations and to follow the principle that prison administrators do not have the burden of proving the correctness of their security decisions by proof of tragic consequences.

Had the court properly applied these deference principles, it would have been compelled to conclude that the institutional security goals could not be safely and efficiently carried out by petitioners unless petitioners changed their behavior and routinely violated the inmates privacy by observing them as they engaged in personal bodily activities and, concomitantly, that the inmates' privacy interests would be protected from constant invasion by the petitioners only at the expense of the institutions' and their own legitimate security interests.

The court's failure to accord the administrative judgments regarding institutional security risks any deference is in direct conflict with all supreme court cases that establish that such deference should be accorded.

II. THE DECISION CONFLICTS WITH DECISIONS OF THE VARIOUS CIRCUITS WHICH HOLD THAT THE FINDINGS OF FACT MUST COVER ALL MATERIAL ISSUES RAISED IN A DEFENSE.

For the factfinding requirements of Rule 52(a) to be met, "the findings of fact on the merits [must] include as many of the subsidiary facts as are necessary to disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion on each factual issue." Denofre v. Transp. Ins. Rating Bureau, 532 F.2d 43, 45 (7th Cir. 1976). Findings of fact must be clearly set forth, separate, specific, and

complete. Fuchstadt v. United States, 434 F.2d 367, 370 (7th Cir. 1970). Findings of fact must cover all the material issues raised by the claims or the defenses presented. Otero v. Mesa Cty. Valley Sch. Dist. No. 51, 568 F.2d 1312, 1316 (10th Cir. 1977). The findings in this case conflict with all of these decisions.

The decision ignores evidence in three areas: (1) uncontradicted evidence of the nature of the security functions entailed in the post orders for the housing posts requiring routine and random surveillance of the residence bathroom and showers, whether occupied or unoccupied and the inherent invasion of privacy in their performance; (2) expert testimony by all of the prison administrators who testified establishing the critical nature of the constant

presence of staff to perform random and routine search and surveillance measures at issue; and (3) the same testimony establishing the risk to security resulting from the deployment of male correctional officers in the housing units because of the male officers' natural desire to respect an inmate's bodily privacy.

The decision's lack of consideration of this body of evidence together with the lack of any deference to the prison administrator's security decisions creates a precedent that clashes with principles established by the supreme court and the various circuits for federal adjudication of cases occurring in the prison setting.

III. THE DECISION CONFLICTS WITH TITLE VII BECAUSE IT DEPRIVES THE PRISON ADMINISTRATOR OF TOOLS THAT ARE REASONABLY NECESSARY TO MAXIMIZE THE GOALS OF INSTITUTIONAL SECURITY AND PRIVACY.

The deference principles recited in the first portion of this brief reflect the supreme court's recognition of the fact that because prison administrators face awesome challenges and, federal judges have neither experience running prisons nor accountability for prison operations, caution on the part of a federal judge reviewing a prison administrator's judgment is warranted. This federal policy encourages penal administrators to implement those regulations that are necessary to enhance their ultimate goal of creating a secure, dignified and rehabilitative environment.

The supreme court has not finally determined whether inmates retain any

privacy rights and certain recent decisions suggest that only the most limited privacy rights remain. See Hudson v. Palmer, 468 U.S. 517 (1984). In addition, at least one court has held that inmates have no constitutional privacy rights. Griffin v. Michigan Dept. of Corrections, 654 F. Supp. 690 (E.D. Mich. 1982). However, the Seventh Circuit has held that inmates are not entirely without constitutional protections against invasions of their privacy by members of the opposite sex. Smith v. Fairman, 678 F.2d 52 (7th Cir. 1982). In addition, the courts have recognized that a BFOQ that protects inmates from opposite sex touching or observation may enhance the atmosphere in a prison by promoting feelings of dignity and self-worth and minimizing the resentment that accompanies the necessary

intrusions. Id., Gunther v. Iowa State Men's Reform., 612 F.2d 1079, cert. den., 446 U.S. 966 (8th Cir. 1980). Forts v. Ward, 471 F. Supp. 1095 (S.D. N.Y. 1979), vacated in part, 621 F.2d 1210 (2nd Cir. 1980). The courts have recognized that correctional interests in establishing a positive, dignified rehabilitative atmosphere can provide a basis for administrative actions protective of inmates' privacy independent of the inmates' constitutional rights to privacy: see Hudson v. Goodlander, 494 F. Supp. 893 (D. Md. 1980); Forts v. Ward, 621 F.2d 1210, 1216, n.10.

This decision undermines the prison administrators' ability to maximize the essential security and dignity components of the prison atmosphere simultaneously. It violates the federal principles of comity and deference as

they are set forth in supreme court and various federal cases and denies the State of Wisconsin the right to determine the mission that its prisons will serve. The state's and the prison administrator's goal of promoting a secure and dignified setting have taken a back seat to the male guards employment interests. Respondents respectfully submit that this result is in direct conflict with Title VII as well as recent supreme court cases involving adjudication of prisons regulations.

CONCLUSION

The lower court decision errs in that it fails to accord the prison administrator's security and day to day operational decisions any of the deference which this court and the other circuits have found to be appropriate. The court has denied this administrator the judicially identified right to anticipate and prevent security problems. The decision substitutes the judgment of the court (and that of the line officers) for that of the prison administrator solely because the administrator did not prove, by incidents occurring on the petitioners' shift, that their security concerns were correct. Thus, the decision exacts a standard of proof at odds with the supreme court's recognition that rational

security regulations aim to anticipate and prevent security lapses, not merely react to such lapses.

The decision at issue deprives this administrator of any ability to establish a legitimate BFOQ based on institution security regulations embodied in post orders because it accorded no recognition, much less deference, to the effective post orders. The decision gave the male officers' employment rights precedence over those essential functions which caused the authorities to implement a BFOQ, i.e., to duty to promote the

security and rehabilitation objectives of the prison in an atmosphere of control, order and dignity.

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